SUPREME COURT, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

No. 91-884

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FARM CREDIT SERVICES, PETITIONER,

v.

RAYMOND L. MORTER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Carolyn S. Holder
HOLDER & DAVIS
700 Bank One Building
P.O. Box 757
Lafayette, Indiana 47902-0757
(317) 742-1124
Counsel of Record for Respondent

Elizabeth A. Justice
WERNLE, RISTINE & AYERS
414 Ben Hur Building
Crawfordsville, Indiana 47933
(317) 362-2640
Counsel for Respondent

QUESTIONS PRESENTED

This is a bankruptcy proceeding involving the exclusion of a debtor's retirement plan from the bankruptcy estate. The questions presented are:

1. Whether a debtor's interest in a retirement plan is excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2) when the retirement plan has restrictions on transfer that are enforceable under the applicable state spendthrift trust law.

2. Whether a debtor's interest in a public university's Teachers Insurance and Annuity Association retirement plan is excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2) when the debtor has made no voluntary contributions to the retirement plan and the absolute restrictions on alienation are enforceable under New York law, the applicable nonbankruptcy law.

LIST OF PARTIES

As a supplement to the List of Parties contained in the Petition for Writ of Certiorari, respondent states that Raymond L. Morter d/b/a Swinengineering, Inc. has no parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. THE DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS 6

A. Every Decision Alleged To Be In Conflict Involved Self-Settled Retirement Plans Controlled By Debtors 6

B. Every Decision Alleged To Be In Conflict Held That "Applicable Non-Bankruptcy Law" Under 11 U.S.C. § 541(c)(2) Was State Spendthrift Trust Law 9

II. THE SEVENTH CIRCUIT APPLIED NEW YORK SPENDTHRIFT TRUST LAW TO EXCLUDE PURDUE UNIVERSITY'S TIAA RETIREMENT PLAN FROM THE BANKRUPTCY ESTATE 11

III. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Alexandre v. Chase Manhattan Bank, 61 A.D.2d 537, 403 N.Y.S.2d 21 (1978) 11

Connick v. Teachers Insurance and Annuity Association of America, 784 F.2d 1018 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986) 12

Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) 14

In re Braden, 69 B.R. 93 (Bankr. E.D. Mich. 1987) 12

In re Daniel, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) 8, 9

In re Goff, 706 F.2d 574 (5th Cir. 1983) 7, 9, 13

In re Graham, 726 F.2d 1268 (8th Cir. 1984) 8, 9, 13

In re Guardianship of Dugan, 29 Misc.2d 980, 222 N.Y.S.2d 833 (1961) 11

In re Jordan, 914 F.2d 197 (9th Cir. 1990) 8

In re Kleist, 114 B.R. 366 (Bankr. N.D.N.Y. 1990) 12

In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985) 8

Page

In re Lucas, 924 F.2d 597 (6th Cir.), *cert denied sub nom. Forbes v. Holiday Corp. Savings & Retirement Plan* 111 S.Ct. 2275 (1991) 10

In re Montgomery, 104 B.R. 112 (Bankr. N.D. Iowa 1989) 12

In re Moore, 907 F.2d 1476 (4th Cir. 1990) 10

In re Parker, 473 F. Supp. 746 (W.D.N.Y. 1979) 7

In re Reynolds, No. 87-15311F, slip op. (Bankr. W.D. Ark., September 18, 1989) 12

In re Swanson, 873 F.2d 1121 (8th Cir. 1989) 8

In re Turpin, 644 F.2d 472 (5th Cir. Unit A 1981) 7

In re Witlin, 640 F.2d 661 (5th Cir. Unit B 1981) 7

In re Woodward, No. 3-86-03344(3), A.P. No. 3-87-0036, slip op. (Bankr. W.D. Ky., February 16, 1988), *aff'd*, No. 3-86-03344(3)7 Civil Action C88-0161-L(A), slip op. (W.D. Ky., June 24, 1988) 12

Matter of Aurora G. v. Harold Aaron G., 98 Misc.2d 695, 414 N.Y.S.2d 632 (1979) 11

Page

McLean v. Central States, Southeast and Southwest Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985) 15

Morter v. Farm Credit Services, 937 F.2d 354 (7th Cir. 1991) 1

Pennsylvania Department of Public Welfare v. Davenport, 110 S.Ct. 2126 (1990) 13

Ruhlin v. New York Life Insurance Co., 304 U.S. 202 (1938) 11

Thompson v. Thompson, 484 U.S. 174 (1988) 14

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 14

United States v. Taylor, 487 U.S. 326 (1988) 14

Statutes

11 U.S.C. §§ 101-1330 3

11 U.S.C. § 110(a)(5) 7

11 U.S.C. § 541(c)(2) ..... *passim*

26 U.S.C. § 401(a)(13) 10

29 U.S.C. § 1002(32) 11

29 U.S.C. § 1003(b)(1) 11

Page

29 U.S.C. § 1056(d)(i) 10

Ind. Code § 34-2-28-1(a)(3) 3

Ind. Code § 34-2-28-1(a)(6) 4

N.Y. Civ. Prac. Law § 5205(c)(3) 12

N.Y. Est. Powers & Trust § 7-1.5(a)(1) 11

N.Y. Est. Powers & Trust § 7-3.1(b)(2) 12

Other Authorities

Rule 15, Rules of the United States Supreme Court 1

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

FARM CREDIT SERVICES, PETITIONER,

v.

RAYMOND L. MORTER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Raymond L. Morter, by counsel, pursuant to Rule 15, Rules of the United States Supreme Court, respectfully submits this brief in opposition to the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. *Morter v. Farm Credit Services*, 937 F.2d 354 (7th Cir. 1991).

JURISDICTION

Petitioner, Farm Credit Services, applied to Justice Stevens for an extension of time within which to file a petition for writ of certiorari on September 27, 1991. Justice Stevens signed an order on September 30, 1991 extending the time. Justice Stevens allowed up to and including November 28, 1991 to file a petition for a writ of certiorari.

STATUTE INVOLVED

11 U.S.C. § 541(c)(2) provides:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

STATEMENT OF THE CASE

Respondent, Raymond L. Morter, served as a professor of veterinary science at Purdue University for more than thirty years. As a condition of his employment at Purdue, Morter was required to participate in the university's retirement plan, the Teachers Insurance and Annuity Association of America/College Retirement Equities Fund ("TIAA-CREF"). Although a participant may make voluntary payments to the plan, Morter did not do so; Purdue paid all preretirement contributions on his behalf. Pet. App. 6, 23, 32.

Purdue University's TIAA-CREF plan makes "no provision for cash surrender or loans and cannot be assigned." The TIAA portion of the plan specifically provides:

> 16. *No assignment.* Any assignment or pledge of this contract or of any benefit hereunder will be void and of no effect.
>
> 17. *Protection Against Claims of Creditors.* The benefits, options, rights, and privileges accruing to any Beneficiary will not be transferable or subject to surrender, commutation, or anticipation, except as may be otherwise endorsed on this contract. To the extent permitted by law,

> annuity and other benefit payments will not be subject to claims of any creditor of any Beneficiary or to execution or to legal process.

Clause 17 of the CREF component of the plan contains similar language protecting benefits against the claims of creditors. Pursuant to these provisions, Morter had no access to the accumulation of assets in Purdue University's TIAA-CREF retirement plan short of retirement or death. Pet. App. 7, 24 n.1, 33-34.

Morter filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1978). Morter listed his interest in the TIAA-CREF retirement plan as exempt. The United States Trustee and petitioner, Farm Credit Services, objected to the claimed exclusion of the TIAA-CREF retirement plan. The bankruptcy court applied Indiana law and ruled that the TIAA-CREF retirement plan was property of the bankruptcy estate. Morter was entitled to exempt only $100 pursuant to Ind. Code § 34-2-28-1(a)(3). Pet. App. 3-21.

Morter appealed to the district court. The district court first examined the legislative history of 11 U.S.C. § 541(c)(2) and determined that Congress intended to exclude only "traditional" spendthrift trusts, not retirement plans that exhibit the characteristics of spendthrift trusts. Applying New York law, the district court held that the CREF component was excluded from the bankruptcy estate, but that the TIAA component was included in the bankruptcy estate. Pet. App. 22-31.

Morter appealed the decision regarding the TIAA portion of the retirement plan; Farm Credit Services did not cross-appeal the district court's decision to exclude the CREF component. The Seventh Circuit held that 11 U.S.C. § 541(c)(2) was not limited to "traditional" spendthrift trusts: "the plain language of section 541(c)(2) does not require that a retirement plan be a 'traditional' spendthrift trust." Pet. App. 37. The court of

appeals noted that four unanimous prior decisions had excluded the TIAA retirement plan from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2) and two New York decisions had held that the anti-alienation provision of TIAA was enforceable under New York law. Pet. App. 38. The Seventh Circuit stated:

> The proper inquiry under section 541(c)(2), then, is not whether the accumulated funds are in a "traditional" spendthrift trust, but whether the retirement plan bars the beneficiary and his creditors from reaching the funds. If it does, the plan is tantamount to a spendthrift trust.

Pet. App. 38. The court of appeals excluded the TIAA portion of the retirement plan from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2); the Seventh Circuit found no need to address Morter's argument that Indiana's recently amended exemption statute, Ind. Code § 34-2-28-1(a)(6) (1990), prohibited levy or execution of the TIAA retirement plan. Pet. App. 41.

The following paragraph from the petition is not part of the record on appeal:

> At the time Respondent filed his Chapter 7 bankruptcy petition, he was indebted to Petitioner by virtue of a promissory note and mortgage executed on or about December 17, 1980. The original note was made by the Federal Land Bank of St. Paul to Respondent, R. William Morter and Carol A. Morter in the original sum of $300,000.00. Subsequent to the abandonment of the real estate securing this debt, the foreclosure of the mortgage and sale of the real estate, Respondent remains indebted to Petitioner in the sum of $66,293.48.

Pet. 5. The Court should not consider these statements because they are not of record.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for writ of certiorari for three reasons. First, the Seventh Circuit's decision does not create a conflict with a decision from another federal court of appeals. Although some prior decisions contain inconsistent dicta, the Seventh Circuit pointed out that the decisions expressed a willingness to exclude an employer-created-and-controlled retirement plan that is analogous to a spendthrift trust. Pet. App. 37-38. All the federal courts of appeals agree with the Seventh Circuit that the phrase "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) includes, at least, state spendthrift trust law. Pet. App. 34.

Second, the Seventh Circuit applied New York spendthrift trust law to exclude the TIAA retirement plan from the bankruptcy estate. The Employee Retirement Income Security Act of 1974 ("ERISA") could not be the "applicable nonbankruptcy law" in this case because Purdue University, as a public institution, is expressly exempted from the federal statute. Under New York law, however, the restrictions on transfer in the TIAA retirement plan have been specifically held to be enforceable. Four prior bankruptcy decisions unanimously relied upon *this* New York law to specifically exclude other institutions' TIAA-CREF retirement plans. Every prior decision involving TIAA-CREF excluded both components of the retirement plan from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2).

Third, the Seventh Circuit's decision is consistent with the statute itself. The plain statutory language of 11 U.S.C. § 541(c)(2) does not require that a retirement plan be a "traditional" spendthrift trust. Pet. App. 37. The starting point for construing a federal statute must be the literal language of the

statute itself. The district court misplaced its reliance on the legislative history of 11 U.S.C. § 541(c)(2) in derogation of the clear statutory language. The Seventh Circuit corrected the district court's error and applied the plain language of the statute.

I.
THE DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

Petitioner asserts that the Seventh Circuit's opinion conflicts with decisions of the Fifth Circuit, the Ninth Circuit, the Eighth Circuit, and the Eleventh Circuit. Pet. 9. No conflict exists. Those decisions concern *self-settled* retirement plans controlled by debtors and they apply state spendthrift trust law as the applicable nonbankruptcy law under 11 U.S.C. § 541(c)(2).

A.
All The Decisions Alleged To Be In Conflict Involved Self-Settled Retirement Plans Controlled by Debtors.

Every case cited by petitioner as conflicting with the Seventh Circuit's decision concerned a self-settled retirement plan. In every case, the debtor funded and controlled the retirement plans thereby defeating the spendthrift nature of the plan. In this case, Purdue University made all preretirement contributions to the TIAA-CREF retirement plan, respondent was required—as a condition of his employment—to be a participant in the TIAA-CREF retirement plan, and Purdue University controlled the TIAA-CREF retirement plan. The cases petitioner cites in conflict are distinguishable.

In cases arising prior to the enactment of the Bankruptcy Code of 1978, courts recognized that spendthrift provisions in employer-created pension plans prevented the benefits from passing to the bankruptcy trustee under Section 70(a)(5) of the

Bankruptcy Act of 1898, 11 U.S.C. § 110(a)(5)(repealed 1978). *See, e.g., In re Turpin*, 644 F.2d 472 (5th Cir. Unit A 1981); *In re Parker*, 473 F.Supp. 746 (W.D.N.Y. 1979). Similar provisions in self-settled plans, however, were not effective in preventing the benefits from passing to the trustee. *See, e.g., In re Witlin*, 640 F.2d 661 (5th Cir. Unit B 1981).

The first court of appeals to consider the application of 11 U.S.C. § 541(c)(2) of the Bankruptcy Code to pension plans, and the case primarily relied upon by petitioner to be in conflict, held that benefits under self-settled Keogh plans were property of the bankruptcy estate. *In re Goff*, 706 F.2d 574 (5th Cir. 1983). The Fifth Circuit explicitly recognized the distinction between, on the one hand, employer-created-and-controlled plans and, on the other hand, self-settled, debtor-created-and-controlled plans:

> In analyzing the effectiveness in bankruptcy of spendthrift provisions in pension plans, the courts have generally concluded that those contained in employer-created plans were effective[,] similar provisions in self-settled plans were not. The latter conclusion is inescapable since . . . the traditional law of spendthrift trusts has rejected the notion of effective spendthrift provisions in self-settled trusts. As to the former, without passing upon the exact limits of plans which could properly be characterized "spendthrift trusts," *the employer-created-and-controlled nature of those plans may well make them analogous to a spendthrift trust.*

Id. at 589 (footnotes omitted)(emphasis added). The Seventh Circuit in this case expressly relied upon the above emphasized language in *Goff* to support its holding. Pet. App. 38. The Seventh Circuit's decision is not in conflict with the Fifth Circuit's decision in *Goff*.

Nor does the Seventh Circuit's opinion conflict with the decisions of the Ninth Circuit cited by petitioner. In one case, the debtor's corporation formed a pension and profit-sharing plan which was managed and controlled by the debtor; the debtor was the sole trustee. *In re Daniel*, 771 F.2d 1352, 1353-1354 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). In another case, the retirement plan was "self settled under Washington law and was not excludable from the bankruptcy estate." *In re Jordan*, 914 F.2d 197, 200 (9th Cir. 1990). These decisions do not conflict with the Seventh Circuit's opinion because Morter's interest in the TIAA retirement plan was not self-settled. Pet. App. 38. Morter did not make voluntary payments to the TIAA retirement plan; Purdue paid all preretirement contributions on his behalf. Pet. App. 6, 23, 32.

Likewise, the Seventh Circuit's decision does not conflict with any decision of the Eighth Circuit or Eleventh Circuit because the retirement plans at issue in those cases were also self-settled. *In re Swanson*, 873 F.2d 1121, 1124 (8th Cir. 1989)(law creating teacher retirement fund included language similar to that found in spendthrift trust, but because debtor-teacher contributed to the fund, the retirement plan was self-settled and would not qualify as a spendthrift trust under Minnesota law); *In re Lichstrahl*, 750 F.2d 1488, 1490 (11th Cir. 1985)(pension plan not a spendthrift trust under Florida law because the debtor "alone enjoys the authority to act, whether as an agent of the settlor or in his own right as trustee and beneficiary"); *In re Graham*, 726 F.2d 1268, 1269 (8th Cir. 1984)(physician's profit sharing retirement plan included in bankruptcy estate when doctor was sole stockholder, director and officer of professional corporation that paid benefits into retirement plan). The Seventh Circuit cited the recent Eighth Circuit case as an example for the following proposition: "Even in cases in which courts have included retirement plans within

the bankruptcy estate, there has been a willingness to exclude the plan if it is employer-created and controlled and, therefore, analogous to a spendthrift trust." Pet. App. 37.

Every appellate court decision cited by petitioner as conflicting can be distinguished by one critical factor—the pension plans were self-settled and controlled by debtors. Because the retirement plans were self-settled and debtor controlled, they could not be analogous to a spendthrift trust under state law.

B.
Every Decision Alleged To Be In Conflict Held That The "Applicable Nonbankruptcy Law" Under 11 U.S.C. § 541(c)(2) Was State Spendthrift Trust Law.

The decisions the petitioner claims to be in conflict with the Seventh Circuit's decision held that state spendthrift trust law was the "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2). *Daniel* 771 F.2d at 1360 ("the phrase '*applicable non-bankruptcy law*' in 11 U.S.C. § 541(c)(2) was intended to be a narrow reference to *state* 'spendthrift trust' law and not a broad reference to *all* other laws, including ERISA and IRC, which prohibit alienation"); *Lichstrahl*, 750 F.2d at 1490 ("'applicable nonbankruptcy law' refers only to state spendthrift trust law"); *Graham*, 726 F.2d at 1271 (Congress did not intend "applicable nonbankruptcy law" to include ERISA, only spendthrift trusts recognized by state law); *Goff*, 706 F.2d at 582 ("Congress intended by its reference to 'applicable nonbankruptcy law' to exempt from the estate only those 'spendthrift trusts' . . . beyond the reach of creditors under state law").

The Seventh Circuit's decision does not conflict with the cases cited by petitioner as to what law is the "applicable nonbankruptcy law" for purposes of 11 U.S.C. § 541(c)(2). The court of appeals quoted from 11 U.S.C. § 541(c)(2) and then stated: "Thus, if state law prevents a creditor from reaching

certain income payable at a future date, then the Bankruptcy Code similarly will treat that income as outside the bankruptcy estate and unreachable by creditors." Pet. App. 34. Both the Seventh Circuit and the decisions alleged to be in conflict hold that the phrase "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) refers to state spendthrift trust law.

The only possible conflict in the lower courts, one not presented in this case, is whether the phrase "applicable non-bankruptcy law" in 11 U.S.C. § 541(c)(2) is limited to state spendthrift trust law or whether it also includes federal law, such as ERISA or the Internal Revenue Code. *See In re Lucas*, 924 F.2d 597 (6th Cir.), *cert denied sub nom. Forbes v. Holiday Corp. Savings & Retirement Plan*, 111 S.Ct. 2275 (1991); *In re Moore*, 907 F.2d 1476 (4th Cir. 1990). *Lucas* and *Moore* were cited as supplemental authority in the court below but the Seventh Circuit refrained from discussing whether or not ERISA plans were excluded from the bankruptcy estate because it was reviewing a non-ERISA plan.

The Seventh Circuit held that the phrase "applicable nonbankruptcy law" referred to state spendthrift trust law. Pet. App. 34. The court of appeals did not decide whether the less restrictive anti-alienation provisions required by ERISA, 29 U.S.C. § 1056(d)(1), and the Internal Revenue Code, 26 U.S.C. § 401(a)(13) would be sufficient, of their own force, to exclude a retirement plan from a bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2). The cases petitioner alleges to be in conflict are consistent with the Seventh Circuit's decision.

II.
THE SEVENTH CIRCUIT APPLIED NEW YORK SPENDTHRIFT TRUST LAW TO EXCLUDE PURDUE UNIVERSITY'S TIAA RETIREMENT PLAN.

Petitioner suggests that this case would be an appropriate one to resolve the apparent conflict regarding the interpretation of 11 U.S.C. § 541(c)(2). TIAA, it argues, is a national retirement plan that could be subjected to different results depending on where the retirement plan is located. This argument is misplaced because Purdue University's TIAA plan is governed by New York law, not federal law. This case is not an appropriate one to resolve the apparent conflict.

Purdue University's TIAA-CREF retirement plan is not governed by the Employee Retirement Income Security Act of 1974 ("ERISA") in that the university is a public institution. 29 U.S.C. §§ 1002(32), 1003(b)(1). The apparent conflict petitioner has asserted—whether the phrase "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) includes ERISA—is not presented in this case and was not decided by the Seventh Circuit.

Furthermore, TIAA's restrictions on alienation are enforceable under New York law. *Matter of Aurora G. v. Harold Aaron G.*, 98 Misc. 2d 695, 414 N.Y.S. 2d 632 (1979); *Alexandre v. Chase Manhattan Bank*, 61 A.D. 2d 537, 403 N.Y.S 2d 21 (1978). This Court stated, "As to questions controlled by state law, however, conflict among the circuits is not itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938).

The Seventh Circuit reviewed New York statutory and case law. Pet. App. 39-40 (citing N.Y. Est. Powers & Trust Law § 7-1.5(a)(1) (McKinney 1988); *In re Guardianship of Dugan*, 29 Misc. 2d 980, 982, 222 N.Y.S. 2d 831, 833 (1961)). *See also*,

N.Y. Est. Powers & Trust Law § 7-3.1(b)(2) (McKinney 1990 Supp.); N.Y. Civ. Prac. Law § 5205(c)(3) (McKinney 1990 Supp.); *In re Kleist*, 114 B.R. 366 (Bankr. N.D. N.Y. 1990). After analyzing New York law, the Seventh Circuit concluded, "There can be no doubt: New York law puts Morter's pension benefits well beyond the reach of Farm Credit Services or any other creditor." Pet. App. 40.

The Seventh Circuit continued by noting that in *every* decision it could find addressed to the pointed question of whether a TIAA plan was excluded from the bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2), "the answer was a resounding 'yes.'" Pet. App. 38 (citing *In re Reynolds*, No. 87-15311F, slip op. (Bankr. W.D. Ark., September 18, 1989) (Respondent's Appendix A); *In re Montgomery*, 104 B.R. 112 (Bankr. N.D. Iowa 1989); *In re Woodward*, No. 3-86-3344(3), A.P. No. 3-87-0036, slip op. (Bankr. W.D. Ky., February 16, 1988) (Respondent's Appendix B), *aff'd*, No. 3-86-3344(3)7 Civil Action C88-0161-L(A), slip op. (W.D. Ky., June 24, 1988) (Respondent's Appendix C); *In re Braden*, 69 B.R. 93 (Bankr. E.D. Mich. 1987)). *See also*, *Connick v. Teachers Insurance and Annuity Association of America*, 784 F.2d 1018 (9th Cir.)(professor could not reach assets in TIAA-CREF plan until retirement, and then only as set forth in plan), *cert. denied*, 479 U.S. 822 (1986).

Moreover, petitioner did not cross-appeal the exclusion of Purdue University's CREF component of the retirement plan. The above-cited bankruptcy decisions excluded both TIAA and CREF, treating the two components similarly. The district court here treated TIAA differently from CREF. Respondent appealed the ruling regarding TIAA, but petitioner did not cross-appeal the exclusion of CREF from the bankruptcy estate. The Seventh Circuit had appellate jurisdiction over only the TIAA portion of the retirement plan. Rather than seeking to bring

consistency to the treatment of TIAA-CREF plans, petitioner's writ threatens the existing consistency regarding the treatment of TIAA-CREF plans.

III.
THE SEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE.

Petitioner argues that an examination of the legislative history behind 11 U.S.C. § 541(c)(2) leads to the conclusion that Congress intended to limit the statute to "traditional" spendthrift trusts. It relies on dicta in a few decisions. *Graham*, 726 F.2d at 1271 ("The legislative history of § 541(c)(2) . . . establishes that Congress intended by that section to preserve the status [of] traditional spendthrift trusts"); *Goff*, 706 F.2d at 582 ("from the legislative history of Section 541(c)(2), it is clear that Congress intended . . . to exempt from the estate only those 'spendthrift trusts' traditionally beyond the reach of creditors under state law"). The dicta in these cases limiting 11 U.S.C. § 541(c)(2) to "traditional" spendthrift trusts is inconsistent with this Court's decisions regarding statutory construction.

The "traditional" spendthrift trust requirement is not found in the language of the statute:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. § 541(c)(2). Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 110 S.Ct. 2126, 2130 (1990). "In this case it is also where the inquiry should end, for where, as here, the statute's language is plain 'the sole function of the

courts is to enforce it according to its terms.'" *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)(citation omitted).

Courts need not resort to legislative history when a statute is clear. "Legislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 808 n.3 (1989). When a statute is clear, interpretations based on legislative history circumvent the democratic process. "[I]t must be assumed that what the Members of the House and Senators thought they were voting for, and what the President thought he was approving when he signed the bill was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said." *United States v. Taylor*, 487 U.S. 326, 345 (1988)(Scalia, J., concurring in part). "Committee reports, floor speeches, and even colloquies between congressmen are frail substitutes for bicameral vote upon the text of a law and its presentment to the President." *Thompson v. Thompson*, 484 U.S. 174, 191-192 (1988)(Scalia, J., concurring in judgment).

The Seventh Circuit in this case held that "the plain language of section 541(c)(2) does not require that a retirement plan be a 'traditional' spendthrift trust." Pet. App. 37. The court of appeals stated that it agreed with the reasoning of the Fourth Circuit that 11 U.S.C. § 541(c)(2)

> should [not] be confined in its recognition of enforceable transfer restrictions to those found in "traditional" spendthrift trusts. The language of § 541(c)(2) does not suggest such a limitation, and the legislative history reveals only that the provision has the unambiguous purpose of preserving enforceable transfer restrictions in spendthrift trusts. . . .

Pet. App. 37 (quoting *McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1207 n.1 (4th Cir. 1985)). The statute is not limited to "traditional" spendthrift trusts. The Seventh Circuit properly applied the plain language of 11 U.S.C. § 541(c)(2) to exclude the TIAA plan from the bankruptcy estate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Carolyn S. Holder
HOLDER & DAVIS
700 Bank One Building
P.O. Box 757
Lafayette, Indiana 47902-0757
(317) 742-1124

Counsel of Record for Respondent

Elizabeth A. Justice
WERNLE, RISTINE & AYERS
414 Ben Hur Building
Crawfordsville, Indiana 47933
(317) 362-2640

Counsel for Respondent

December 24, 1991